UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD REGION 3

ARMOR CONSTRUCTION, LLC

Case 03-CA-148130

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

I. PRELIMINARY STATEMENT

The unfair labor practices alleged in the Complaint against Armor Construction, LLC ("Respondent"), arose because Respondent's employee Michael Rublee, discussed employee wages and the Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (the "Union") with Respondent's employees. Respondent, a non-union contractor, admits telling its employees to keep their wages confidential. Contrary to such direction, the unrefutted evidence reveals that Respondent knew Rublee discussed his wage rate with other employees, asked other employee about their wages and compared union wage rates with employees. Rublee contacted the Union, and told his fellow employees about his interest in returning to the Union. This occurred after Respondent granted Rublee a wage increase to stave off his interest in the Union. Respondent admits learning about Rublee's continued interest in the Union however notwithstanding the wage increases it gave Rublee. The Union was Respondent's competitor for projects and skilled

labor. As a result, Respondent interrogated, threatened, removed Rublee's company-owned vehicle and demoted Rublee from his foreman position. Failing to quench Rublee's protected activities, Respondent admits it received a call from an employee frustrated with Rublee's wage discussion on the job. In response, Respondent immediately contacted Rublee and terminated his employment.

Respondent offers a myriad of reasons for its actions toward Rublee. Many of those reasons appear pretextual or pilled on to mask Respondent's true unlawful motive for Rublee's demotion and termination. The record evidence however consisting of Respondent's own admissions and the unrefutted testimony of discriminatee Rublee demonstrate that Respondent interrogated, threatened and ultimately demoted and terminated Rublee's employment for engaging in protected concerted and union activities.

II. STATEMENT OF THE CASE

This matter was heard by Administrative Law Judge Thomas Randazzo (ALJ), on October 5, 6 and 7, 2015[1] in Buffalo, New York. The Complaint, which issued July 28, alleges that Respondent violated Sections 8(a)(1) and (3) of the Act by interrogating employees, prohibiting its employees from discussing wages and the union with other employees, demoting its employee Rublee, by removing him from his foreman position and removing his company-owned vehicle, and terminating his employment because he engaged in union and protected concerted activities. (GC Exh. 1(g))[2] On October 5, the Complaint was amended to allege Respondent made an implied threat of discharge in violation of Section 8(a)(1) of the Act. (GC Exh. 1(n), Tr. 6-7)

[1] All dates referenced herein are in 2015 unless expressly stated otherwise.
[2] Throughout this brief the following references will be used: GC Exh.___(at____) for the General Counsel's exhibit; R. Exh._(at____) for Respondent's exhibit (at page number) and Tr.____ for transcript page(s).

In its Answer to the Complaint, Respondent denied violating Sections 8(a)(1) and (3) of the Act. In summary, Respondent plead as its affirmative defense that Rublee was a supervisor under Section 2(11) of the Act, and that although, Respondent rescinded Rublee's use of a company-owned vehicle, Rublee was not demoted because Rublee maintained his job title and rate of pay. (GC Exh. 1(i)) At the hearing in this matter, Respondent stipulated that the Union is a labor organization under Section 2(5) of the Act, and that a helper is an employee under the Act. Furthermore, Respondent amended its Answer to the Complaint at the hearing to assert that Rublee possessed the supervisory indicia to hire, transfer, promote, discharge, assign, discipline, responsibly direct, adjust grievances or effectively recommend such actions. (Tr. 10-11)

III. FACTS

Respondent maintains an office and work shop in Falconer, New York, where it designs and installs automatic sprinkler systems. Respondent employs foreman and helpers, also referred to as its field personnel. The field personnel install the sprinkler systems at various locations contracted by Respondent. Respondent employs approximately seven foreman and five helpers that work as a team in the field. Helper's are generally unskilled laborers that are trained on the job until they develop skills to read prints, and install sprinkler systems. After that, they are often promoted to foremen.[3] (Tr. 172, 173, 201, 202, 203, 241, 429, 454-455) Respondent assign foremen a company-owned vehicle with tools and a gas card for fueling the vehicle. Foremen use the vehicle to drive to and from work and for personal use.[4] (Tr. 59-60) Foremen

[3] The field personnel also perform their duties based on the national fire code (NFPA). (Tr. 306-307, 342, 284-285) In addition to the blue prints, each foreman has a code book they use as an instructional guide to assist with installing the various sprinkler systems. (Tr. 287)

[4] Foreman John Pinciaro uses the company-owned vehicle as his exclusive vehicle for work and personal use. (Tr. 98) Although Lynn asserts that all foremen do not have an assigned company-owned vehicle, no witnesses including Lynn were able to identify a foreman without a vehicle.

also travel to jobs for service calls and between worksites as assigned. Foreman Supervisor, John Pinciaro testified that all foremen under his supervision have a company-owned truck. (Tr. 228)

Respondent also employs one administrative person that performs clerical work, and two designers, also referred to as project managers, that design the sprinkler systems, produce the blue prints for the field personnel to install the systems, and assign the field personnel to Respondent's various jobsites.

Respondent is owned by husband and wife Scott and Shannon Lynn. Scott Lynn ("Lynn") is Respondent's president.[5] He oversees all of Respondent's employees. Lynn also performs approximately 95 percent of the bidding and estimating for Respondent's contracted projects. (Tr. 28) Lynn also reviews the design drawings for projects. In summary, Lynn oversees virtually all of Respondent's operations including its financial and personnel matters.

Lynn is a former Union member. Lynn's father owns a unionized company, Allied Fire Protection ("Allied"), where Lynn previously worked in the sprinkler installation trade. Despite Lynn's prior union membership, Lynn personally thought the Union was out to "hurt" him and to steal all of his "good guys". (Tr. 37, 38, 100)

A. Michael Rublee

Michael Rublee is a skilled sprinkler installer trained in the Union's apprenticeship program. (Tr.98-99) In the late 1990's through the early 2000's, Rublee was also employed by Allied, where he entered the Union's apprenticeship program. While at Allied Fire Protection, Rublee and Lynn worked together in the trade. Subsequently, Rublee left the Union. (Tr. 99)

[5] Respondent identified no position held by Shannon Lynn.

In April of 2013, Respondent hired Rublee as a helper earning approximately $12.00 per hour. (Tr. 101) Two months after Respondent hired Rublee, Lynn promoted Rublee to a foreman. (Tr. 95-96) Lynn assigned Rublee a company-owned truck with tools and a gas card for fuel expenses. Rublee exclusively used the vehicle during his employment to travel from home to work and to Respondent's various jobsites. He also used it for personal matters on occasions such as to move his belongings from his personal residence. (Tr. 113)

Beginning in 2013, Rublee began discussing wages with his co-workers. (Tr. 101-102) Through these discussions, Rublee learned that as a foreman, he was earning less than a helper. In response, in or about the summer of 2013, Rublee went to Lynn's office and requested a pay raise. (Tr. 101) During this discussion, Rublee disclosed to Lynn that he knew the wage rate of his helper, and that his helper was earning more money than Rublee, and that he did not think it was fair. (Tr. 101) In response, Lynn gave Rublee a pay raise. (Tr. 102)

Continuing through 2013 and late October 2014, Rublee continued to inquire with co-workers about their wages, and subsequently returned to Lynn on numerous occasions to request higher wages. (Tr. 102-106, GC Exh. 5) During one of Rublee's visits to Lynn's office for a pay raise, Rublee told Lynn that Tailour Terhune, a helper, was earning more money than he was.[6] (Tr. 105) In response, Lynn told Rublee that we "don't talk about our wages. That's between you and I, Employer/employee, not between employees." (Tr. 106, 107) On another occasion, Rublee told Lynn that he spoke to employees Tailor Trehune and John Pincharo, and that although he was now earning more than Trehune, a helper, Pinciaro, a foreman was earning considerably more than Rublee. (Tr. 107) Lynn agreed to another raise. However, Lynn again

[6] Trehune later was promoted to a foreman. Prior to working for Respondent, Trehune had no sprinkler installer experience. (Tr. 341-342)

told Rublee that "we don't talk about that, that that is exclusively between you and I not the employees." (Tr. 107)

Lynn admitted that he prohibits employees from discussing their wages among employees. (Tr. 43) Lynn testified that he instructed employees to keep their wages confidential, and that if they receive a pay raise they should keep it confidential. (Tr. 43, 432) During a corporate meeting in September 2014, Respondent directed employees that "when they get a raise it should be kept confidential and that goes the same for profit sharing." (Tr. 77) Despite such directives, the record evidence demonstrates that Lynn knew Rublee talked to employees about wages despite Respondent's desire that they remain confidential. (Tr. 43-44) Although Lynn testified that they all discuss their wages, he identified no other employee admonished for violating his directive other than Rublee.

Employee wages are not set and Respondent does not award employees periodic pay increases. (Tr. 38) Lynn testified that he "determines employee pay rates based on what . . . [he] thinks an individual's worth is to the company based on their job performance."[7] (Tr. 38-39) At the time Rublee was terminated he was earning $19.00 per hour, and was the second highest paid field personnel employed by Respondent. (Tr. 41)

Rublee began comparing union wages with Respondent's wages.[8] In late September or early October 2014, Rublee requested his final pay raise. At the time, Rublee was working at the Aloft Hotel project in Buffalo, New York. The Aloft Hotel project was one of Respondent's largest projects. It was a six-story hotel near the Buffalo-Niagara International Airport. It was

[7] Lynn was impeached at the hearing on this point with his June 4, 2015 affidavit, a prior sworn statement, when he attempted to qualify such statements to include consulting with his wife, a co-owner, on wage decisions, and to state that job performance was one factor among others. (Tr. 38-40)

[8] Rublee testified that he learned that Union journeyman earn $31 per hour and receive a 5% wage increase every six years. (Tr. 154)

such a large project that Respondent had trouble providing adequate manpower for the job. (Tr. 43) Rublee testified that he worked on the year-long project alone, approximately 70 percent of the job – with no other foremen or helper.[9] (Tr. 110) During Lynn's visit to the Aloft Hotel jobsite, Rublee requested his final wage increase. (Tr. 107) Rublee asked Lynn for $20.00 per hour. (Tr. 108) To justify his request, Rublee told Lynn that he had talked to Jim Rosengren from the Union, and that Rosengren said Rublee could get more money with the Union. (Tr. 42) Although Lynn did not grant Rublee's request at that time, in mid to late October 2014, Lynn gave Rublee a raise to $19.00 per hour. (Tr.111, GC Exh. 5)

At various times over the period 2011 through the Fall of 2014, Respondents' employees Tailour Trehune, Rublee and Floyd Austin all reported to Lynn that the Union approached them, and each of them, in one way or another, had assured Lynn that they rebuffed the Union's advances at that time. In response to these reports, Lynn expressed his fear that the Union was out to "hurt" him. (Tr. 35-38, 101) Rublee testified that he told Lynn about running into the Union's Business Agent Mark O'Connor at the Burger King in Falconer, New York. Lynn responded to Rublee that the Union was "trying to get all my good guys, Mike, and they're trying to get you too." (Tr. 101) Compounding Lynn's fears, Rublee began asking Respondent's employees about their wages and comparing his co-workers' wages and the Union's wage rates. (Tr. 101-106, Tr.154)

In late October, 2014, after he did not receive $20 per hour wage rate, Rublee contacted the Union's Business Agent Michael O'Connor to rejoin the Union. (Tr. 111) After talking to

[9] Rublee testified that he frequently asked Lynn to assign a helper to the Aloft Hotel project to assist him. Such requests were made every other week. (Tr. 110) Lynn responded to Rublee's requests by telling Rublee to "hang tight, I know we need to hire some more people. We need to get you a helper, but just hang tight. (Tr. 110-111) It is unrefutted that after the Aloft Hotel job was over, Lynn on January 15th (this conversation is discussed in more detail below) complimented Rublee on his work at the Aloft Hotel job. Rublee earned the company additional money on the job by performing extra changes to the project. (Tr. 114-115)

the Union, Rublee told employee Jamie Hall that he was going back to the Union. (Tr. 111) During this discussion, Hall asked Rublee how much he earned, and Rublee told him $19 per hour. (Tr.111) Rublee testified that this conversation occurred on the jobsite before he was demoted on January 15. (Tr.111)

Lynn admitted that Hall informed him that Rublee was talking about the Union. (Tr. 47-49)

1. January 15 - Owner Scott Lynn's Coercive Conduct and Rublee's Demotion

On January 15 Rublee went to Respondent's shop to pickup his pay check. Rublee was informed that Lynn was holding his check, so Rublee went to Lynn's office. Upon entering the office, Rublee testified that Lynn immediately said, "Are you looking for other work?" Rublee responded, "No." Lynn ignoring Rublee's denial continues: "Because if you're looking for other work, there's the door, I can let you go right now . . . . what's all this stuff about the Union, I keep hearing this stuff." (Tr. 112-113) Rublee testified that he was shocked by Lynn's statements.

Lynn continued to discuss two projects Rublee had worked on.[10] Before ending the conversation, Lynn told Rublee, "I'm pulling your truck and we'll see if you leave now." He further instructed Rublee to "get a hold of Tailour …you'll be working with him tomorrow, leave the truck at the shop."[11] (Tr. 113) Rublee testified that Lynn assigned him to the Maple Road

[10] During this discussion, Lynn tells Rublee that his current job (173 Elm) is over on hours, and that he did a good job on the Aloft Hotel job with all of the "extra tickets" and that it was a "job well done". (Tr. 113) Rublee testified that the "extra tickets" were additional business Rublee obtained for Respondent on the Aloft Hotel Project. (Tr. 115) This business was generated from Rublee moving installed piping from one location to another on the Aloft project to accommodate the other craft trades working on the jobsite, and as a result of changes to the blue prints. These changes resulted in Respondent being paid for extra work on the job.(Tr. 115)

[11] At the time, Respondent told Rublee that it was taking away Rublee's assigned company-owned truck, Rublee was in the process of moving from his personal residence and was using the vehicle for the move, and he requested to take the vehicle that evening to complete the move. Rublee had driven from home to the shop in the vehicle and had no other means to return home. (Tr. 115-116)

home project to work as Trehune's helper where he continued to work until the end of his employment. (Tr.115. Tr.127-128)

Lynn admits, in part, Rublee's account of the January 15 conversation. Lynn testified that employee Jamie Hall reported to him that Rublee was talking about the Union.[12] (Tr.48) Lynn further admits approaching Rublee and telling him that Hall reported that Rublee was "still talking about the Union." (Tr. 48-49) While Lynn denied that he "confronted" Rublee with this information, Lynn admits telling Rublee that he knew Rublee was talking about the Union. (Tr. 49) Although Lynn testified about the events on January 15th, he never denied interrogating Rublee or making an implied threat of discharge by telling Rublee "there's the door, I can let you go right now . . . . what's all this stuff about the Union, I keep hearing this stuff." (Tr. 112-113, Tr. 82)

It is unreffuted that prior to January 15, Rublee had never been disciplined, nor had he been told that his employment was in jeopardy. (Tr. 123, 183, 91) In fact, until this time, Rublee had received many accolades from Lynn regarding his performance and was used by Lynn to complete troubled projects. (Tr. 123-126)

From January 16 until the end of Rublee's employment, he worked with his former helper Tailour Terhune, as Terhune's helper.[13] (Tr. 115, Tr. 127-128) Rublee testified that he was performing helper work cutting pipe and hanging pipe as requested by Trehune while at the Maple Road Senior Home. (Tr. 168-169) Rublee voluntarily performed occasional tasks more akin to a foreman at Trehune's request. Lynn assigned Rublee to the jobsite as a helper, and during that time Rublee was not directed by Lynn to perform foreman work. (Tr. 171)

[12] Lynn denies talking to Hall on the day he terminated Rublee's employment.
[13] Tailour Trehune testified that he was the foreman on the Maple Road project and that Rublee was a foreman on the jobsite. (Tr. 346)

Lynn testified that Rublee continued to work as a foreman after January 15 at the Maple Road project.[14] (Tr. 83) Although Respondent denied demoting Rublee from his foreman position, Respondent repeatedly admitted it demoted Rublee by removing him from the foreman position and removing his company owned vehicle.[15] During the hearing, Lynn's testimony was inconsistent with his prior sworn statement in which he acknowledged demoting Rublee by offering to give Rublee "every opportunity to earn the truck back and the foreman position back."[16] (Tr. 79)

2. Respondent Removes Rublee's Truck Privileges

On or about January 15, Lynn decided to remove Rublee's vehicle, and told Rublee that he would no longer drive the company-owned vehicle.[17] (Tr. 52-53) Lynn asserted that he

[14] However, Respondent failed to establish Lynn's personal knowledge of the work performed on the jobsite as he failed to testify to working on the Maple Road jobsite at the time Rublee was there.

[15] GC Exh. 8 at 2: "10. On or about January 16th, Mr. Lynn removed Mr. Rublee as a foreman based upon Mr. Rublee's continued poor performance…..Following the removal of Mr. Rublee as a foreman, Mr. Rublee returned a company-owned and issued vehicle to Armor Construction in a filthy condition."

GC Exh. 8 at 3: "16. While the employer is not aware of any specific event referred to in the First Amended Charge, in the event the allegation r**efers to the removal of Mr. Rublee as a foreman a**nd/or the employer's decision to no longer allow Mr. Rublee to use a company-owned vehicle, the employer earnestly maintains Mr. Rublee was **removed as a foreman** based upon Mr. Rublee's continued poor performance. Furthermore, Mr. Rublee was no longer permitted to use a company-owned vehicle and the tools maintained in that vehicle because. . . ."(Emphasis Added)

GC Exh. 7 at 3: "4. **Mr. Rublee was removed from the foreman position** because he was not taking care of his tools, truck and materials and was poorly managing his job sites." (Emphasis Added)

[16] Respondent asserts that Rublee was not demoted because his pay rate was not changed in January. (Tr. 83-84) However, Rublee's wage rate did not change when he was initially promoted from a helper to a foreman. Therefore, evidence that his wage rate did not change when he was removed from the foreman position is not dispositive of the issue.

While General Counsel acknowledges that all credibility findings are in the exclusive control and discretion of the administrative law judge, Lynn's numerous deviations from his prior sworn statement taken under oath and Respondent's admissions in its two position statements, supports a strong argument that Lynn lacks credibility. Furthermore, Lynn admitted hiring counsel, providing information to counsel for the investigation of the Board charge, and receiving copies of Respondent's Statements of Positions submitted to the Region dated May 8th (GC Exh. 8) and May 19th (GC Exh. 7). Lynn further testified that upon receipt of the Statements of Position he did not notify counsel of any errors or discrepancies contained therein. (Tr. 49, Tr. 53)

[17] Although Respondent, by Lynn, testified that not all foremen have a company-owned truck to use, Respondent failed to identify one foreman that did not have a company assigned vehicle. (Tr. 86-87) Respondent's own

removed his truck and had him work with Trehune simply to have Rublee "rid[e] with another foreman for a period of time because [Respondent] had two foremen on that job and Lynn did not want an empty vehicle driving back and forth."[18] (Tr. 82) After instructing Rublee to leave his vehicle at the shop, Respondent then saw the condition of the vehicle finding it "deplorable."[19] (Tr. 82)

After Rublee's conversation with Lynn on January 15, he was never reassigned the company-owned truck or the tools contained therein. (Tr. 118) He never had use of the gas card and was denied transportation from home to work, and for personal use.[20] Rublee testified that the truck remained at the shop after his truck privileges were removed and that his personal tools were never returned from the truck after January 15. (Tr. 159)

3. Rublee's Termination – Respondent's Express Animus

Rublee was terminated on Saturday, February 7. (Tr. 119) Lynn testified that on the day he terminated Rublee he received a call from employee Tailour Trehune. (Tr. 54-55) Trehune

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witnesses testified to all foremen having a truck. (Tr. 228) Respondent's witness John Pinciaro, a foremen supervisor, testified that all three foremen under his supervision are assigned company-owned trucks. (Tr. 228) Pinciaro testified that he supervises all foremen except Buck Seekings and Respondent's project manager Todd North testified that Buck Seekings has a company-owned truck. (Tr. 294)

[18] Rublee testified that during his employment with Respondent, each foreman had an assigned company-owned vehicle, and that when more than one foreman was working on a project, each drove to the jobsite in their individually assigned company-owned trucks. (Tr. 116) This testimony is unrefutted by Respondent.

[19] Although Respondent contends that after it removed Rublee's company-owned truck – it learned that the truck's condition was unkempt, Respondent failed to refute Rublee's testimony that the reason proffered by Respondent on January 15th when his vehicle was removed was because he was engaged in all this Union talk with other employees. (Tr. 112-113, 48) Rublee testified that Respondent observed the condition of his company-owned vehicle and that it was a running joke between Lynn and Rublee - Rublee's vehicle was like "Uncle Hal" a retired sprinkler fitter that worked for Lynn's father while Lynn and Rublee worked together. Uncle Hal had a dirty truck but performed good work for Allied. (Tr. 143, Tr. 158) Respondent did not refute Rublee's testimony on this point. Rublee testified that over his employment his truck would get dirty and he would clean it every six months. (Tr. 143-144) The last time he had done so was late winter-early Spring 2014. (Tr. 144-145) Respondent's Project Manager Todd North testified that he also had to address the cleanliness of foremen vehicles with Buck Seekings and Tailour Trehune. (Tr. 294) North never disciplined or warned Rublee about the condition of his vehicle – North testified that the condition of Rublee's truck was just mentioned in passing. (Tr. 321-322) Rublee also denied that Lynn told him to clean his truck on multiple occasions. (Tr.143)

[20] Rublee was permitted, upon request, to use the vehicle to get home from work on January 15, he had arrived to work in the truck, and was permitted to complete moving his personal residence on Jan. 15 when he requested to do so.

reported to Lynn that Rublee told him he was earning $19.00 per hour and that he was upset because he (Trehune) was more senior than Rublee and earning less money.[21] (Tr. 55-56, GC Exh. 7 at 4, par. 9) After talking to Trehune, Lynn testified that he called Rublee and notified him that his employment was terminated. During Lynn's telephone call with Rublee, Lynn testified that he told Rublee that he had spoken to Trehune, and that Trehune told him that Rublee was discussing his wages. (Tr. 57) Lynn admonished Rublee by stating "Why do conversations about wages have to come up? That shouldn't be happening" (Tr. 57)

Rublee's testimony about the February 7th conversation with Lynn is similar but also includes Lynn reporting that he talked to employee Jamie Hall, and that Hall told Lynn that Rublee was discussing the Union. Rublee testified that he received a telephone call from Lynn in the morning. (Tr. 119) Forgoing greetings, Lynn immediately said to Rublee "you're still disclosing your hourly wage . . . I will not have that." (Tr. 119) Lynn told Rublee that he had received a call from Jamie Hall and that Hall called him "distraught". (Tr. 119) Rublee testified, Lynn reported to Rublee that "Jamie had unloaded a bunch of stuff about [Rublee] talking about the Union." (Tr. 119) Lynn then announced "I'm done, I'm letting you go." (Tr. 119-120) During the same telephone call, Rublee testified that Lynn reported that he also talked to Tailour Trehune, and that Trehune reported that Rublee had raised a quarter inch pipe too high. (Tr. 119-120)

Although Lynn denied talking to Hall on February 7, he admitted that Hall was working on the jobsite that Saturday with Trehune. (Tr. 59) Lynn further admitted talking to Hall, and

[21] Lynn also testified that Trehune mentioned that there was some piping work that Rublee had installed incorrectly. (Tr. 57) Rublee testified that when Lynn asked him about it during the telephone call, he assured Lynn that he had already talked to Terhune about it, and that he had raised piping over a dryer vent and that "it should not be a big deal." (Tr. 119-120) Nevertheless, Lynn terminated his employment. Trehune testified similar that Rublee i.e., that Rublee installed the piping over the air duct and that the correction took only an hour or two to adjust. (Tr. 348-349) Rublee was not the foreman on the job, and Trehune, not Rublee was responsible for the interpreting the blueprints at the jobsite.

Hall reporting to Lynn that Rublee was still talking about the Union. (Tr. 47-49, 57) Lynn further admits that after talking to Hall, Lynn went back to Rublee and told him, Hall said Rublee was "talking about the Union." (Tr. 48-49)

4. Respondent's Shifting Reasons for Rublee's Termination

Other than the express reason for Rublee's termination stated by Lynn on February 7, Respondent proffered a variety of reasons for terminating Rublee's employment at different times.

a. New York State Unemployment

Initially on March 2, Respondent, by Lynn, in opposing Rublee's unemployment insurance application notified the New York State Department of Labor Unemployment Insurance division that Rublee was terminated due to a "continual loss of tools & materials & discussed many times w/ other employees leaving to competitors". (GC Exh. 9) Lynn admitted that Respondent's competitors include union companies. (Tr. 71) Lynn testified that other than Rublee, he never opposed an employee's unemployment. (Tr. 88-89)

Contrary to Respondent's report to NYS Unemployment, Respondent's Project Manager Todd North testified to being in charge of tools and materials for Respondent. However, North did not recall Rublee missing any tools.[22] (Tr. 319)

b. Respondent's Admissions in Position Statements

Respondent in its May 8 Statement of Position asserts that "the decision to discharge Rublee was based solely and exclusively on Mr. Rublee's repeated and continued poor work

[22] North testified that sometime between April and October of 2014, he had to fix a portable threading machine assigned to Ruble and a hammer drill (Tr. 298-290, 292) On direct examination, North testified that Rublee's threading machine was likely subject to abuse resulting in its need for repair however on cross-examination, North admitted Rublee's machine had more wear and tear than normal due to the year-long project at the Aloft Hotel project and that wear and tear can cause the need for such repairs. (Tr. 320) Discovery of the tools in Rublee's assigned vehicle were only made after Lynn questioned Rublee about talking about the union on January 15 when he removed his vehicle. (Tr. 112-113)

performance and Mr. Rublee's demeaning actions against fellow employees and the employer . . " (GC Exh. 9, Pg.1-2, Par. 3) However, Respondent presented no evidence about Rublee's "demeaning" actions other than a statement to a co-worker regarding his wages in which Rublee commented that it was "just another day working for peanuts." (Tr. 65, GC Exh. 7 at 3, par. 3)

Lynn admits that the position statements fail to mention an actual loss of tools and materials as a reason for his termination. (Tr.70, GC. Exh. 7, 8) While Respondent mention, in its position statements, that it discovered tools covered in snow from Rublee's assigned truck, it never states that the tools were lost or no longer of use. More importantly, Respondent admits discovering the condition of the tools after it had taken away Rublee's company-owned vehicle on January 15.

Respondent asserted that Rublee's jobsites were disorganized as his performance flaw. However, Lynn testified that it is the helper's role to organize the materials on the jobsite. (Tr. 33-34) Respondent tolerated what it considered disorganization and failed to alert Rublee that such action could result in discipline.[23] Respondent assigned Rublee to projects because of his ability in the trade. Rublee testified that he was assigned to 173 Elm Street project in late December 2014, by Lynn, because the job was running behind under its initial foreman Buck Seekings. (Tr.125) Lynn told Rublee, "I really got to get you there, it's running behind. I know you can do it, Mike. I know you can pull it back together, so get it back on schedule." (Tr. 124) The 173 Elm Street project was Rublee's last project as a foreman. While working at 173 Elm, sometime in December 2014, Lynn told Rublee that the certain materials at the 173 Elm Street project should be stored inside the jobsite. (Tr. 383) When Lynn returned a week later the

[23] Any contention by Respondent that its communication with Rublee regarding the organization of his worksite was disciplinary in nature is unsupported by the record that reveal such discussions were at best instructive. (Tr. 419-425)

materials were still outside. (Tr. 383, R. Exh. 8 and 10) However, Lynn failed to testify that he disciplined Rublee or notified Rublee that his job was in jeopardy. (Tr. 421-425) Rublee testified that he was unable to bring the materials inside the jobsite because the first floor was being finished and the materials were unable to fit in the basement. (Tr. 474-475) As a result, Rublee asked Lynn for tarps to cover the materials outside; Lynn said he would get Rublee tarps and that there were some in the shop, however, Rublee was unable to locate them. (Tr. 474-475) Subsequently, Respondent moved Rublee to a jobsite in Pennsylvania shortly after. (Tr. 475) This testimony is unrebutted. Lynn testified that he continued to work with Rublee despite what Lynn perceived as Rublee's failings. (Tr. 91)

Regarding the Aloft project, Lynn discussed with Rublee the organization of the Aloft Hotel jobsite. (Tr. 182) Respondent assigned Rublee to the Aloft Hotel to perform approximately 70 percent of the project alone, despite any asserted performance issues. Respondent elicited testimony regarding the lack organization at the Aloft jobsite from Buck Seekings who attributed such, in part, to a lot of crafts working on the jobsite. (Tr. 254) He testified that Rublee had to remove piping that they had installed, so the plumber craft could install its work. (Tr. 254) Seekings only worked at Aloft for approximately 10 hours over the year-long project. (Tr. 261-262) It is unrefutted that Rublee performed 70 percent of the Aloft project alone without a helper or foreman to assist, despite repeatedly asking Lynn for help. (Tr. 110-111)

In addition, Lynn testified that it is the helper's role to organize the materials on the jobsite. (Tr. 33-34)

c. Respondent's Additional and New Reasons for Rublee's Discipline

For the first time at the hearing in this matter, Respondent asserted that Rublee was responsible for a missing "fire pump bypass pressure gauge" valued at approximately $1,500 (Tr. 306, 309, 327) Respondent's Project Manager Todd North testified that the gauge went missing sometime in the summer of 2014, and that it was needed for testing in November or December of 2014. (Tr. 307) The gauge is used to test a 700 lb fire pump at the Aloft Hotel project. Despite asserting that the gauge was missing, the project was tested on three occasions. (Tr. 324-325) North testified that he was not the project manager for the Aloft project or the 173 Elm project on which Rublee was working at the time, and that he did not recall Rublee being on the Aloft jobsite when the gauge was missing for the first test. Rublee testified that had no knowledge of the gauge being delivered to the Aloft Hotel jobsite. (Tr. 185) Rublee testified that pump could not be tested without the gauge and that the pump was tested on three occasions – two of which he attended. (Tr. 470) At the time the gauge went missing Rublee was working at both the Aloft and 173 Elm project. (Tr. 471)

Despite testimony about the gauge at the hearing, Respondent never attributed the missing gauge to Rublee in its two position statements to the Region or during Lynn's June 4th affidavit to the Region. (GC Exh. 7, 8) More importantly, Respondent never asserted that the missing gauge was one of the reasons it disciplined and terminated Rublee's employment. It is undisputed that Respondent tested the pump on three occasions and that doing so required the gauge. (Tr. 470) Respondent presented no evidence that it had to replace the gauge.

Respondent offered into evidence R. Exh. 5, detailing various documents and charts concerning Rublee's job performance during the full term of his employment. For the first time

at the hearing, Respondent blamed or attributed fault to Rublee for all of the projects he worked on because the number of hours worked failed to match the hours bid for the projects. (Tr. 425) Respondent admitted that the bid hours could have been the cause. (Tr.425) Respondent included other employee hours in assessing Rublee's performance on each project. (Tr. 424-425, R. Exh. 5) In addition, Lynn repeatedly awarded Rublee with wage increases and bonuses during much of the same time period the projects identified in R. Exh. 5 were performed.[24]

More importantly, Lynn further admitted to testifying in his affidavit that "if a job goes over on hours there is no discipline." (Tr. 439-440) He further testified that the analysis was done on a continual basis at the time the projects were performed. However, Respondent offered no evidence that Rublee was formally disciplined, or even notified that his work hours during the time period could place his employment in jeopardy. (Tr. 419-422, Tr. 408-409, 418, R. Exh. 5)

Lynn testified in his Affidavit to the Region that Rublee was stealing time while employed by Respondent. (Tr. 71-72) Respondent did not however assert that Rublee was terminated for theft of time to the NYS Department of Labor when it opposed his receipt of unemployment benefits, nor did Respondent mention such conduct in its two position statements to the Region. (GC Exh. 2, 3) Even at the hearing, Respondent did not contend that it terminated Rublee because he allegedly stole time. When asked if he told Rublee about it when he terminated his employment, Lynn responded, "I believed so". (Tr. 72) However, Lynn admits that at the time it learned of the alleged theft of time, Rublee was working on the Aloft project when Rublee received several pay raises, and was not disciplined for such alleged

[24] Lynn testified that he "determines employee pay rates based on what . . . [he] thinks an individual's worth is to the company based on their job performance." (Tr. 38-39) At the time Rublee was terminated, he was the second highest paid field personnel employed by Respondent. (Tr. 41)

discrepancies. (Tr. 89-91) Lynn also testified that it was "common" for there to be discrepancies in employees' time reporting. (Tr. 92)

Respondent identified no employee disciplined for theft of time including Rublee.

2. Disparate Treatment

Prior to January 15, Rublee had never been disciplined, nor had he been told that his employment was in jeopardy. (Tr. 123, 183, 91) Except for conclusory statements, Respondent identified no other employee disciplined, demoted or terminated[25] other than Rublee. (Tr. 232, 234, 267, GC Exh. 2, 3) However, the record reveals employees performed faulty work, failed to report to work, slept on the job - with little recourse. (Tr. 199, 365) Rublee testified about the faulty work performed by Buck Seekings on two occasions: a valve installed improperly in a warehouse in Buffalo caused a leak and a "bunch of exposed" piping that was installed "very crooked" that required Rublee to remove and reinstall the piping. (Tr. 128- 131) On each occasion, Lynn was either notified about the faulty work and was the supervisor directing Rublee to correct the work. (Tr. 120-132) Seekings was neither reprimanded nor disciplined for his work performance. (Tr. 132, 267) In addition, Respondent's witness, John Pinciaro, testified to performing faulty work and having an opportunity to correct his work without consequence. Despite concluding that he was "disciplined", Pinciaro testified that he was never told his

[25] Lynn testified that Rublee recommended employee Tom Lupton for discharge, however, Lynn testified that he was laid off after Respondent analyzed labor/cost reports for all the projects Lupton worked prior to laying him off. (Tr. 368-369) Pinciaro testified to sending helper, Kyle Haller, home from a jobsite and reporting it to Lynn. Pinciaro testified that he was a foreman at the time. Lynn testified that Pinciaro recommended Haller's discharge when he was a foreman. However, Lynn testified that despite Pinciaro's recommendation, Lynn "continued to try to work with Haller" and that Haller "just stopped showing up for work." (Tr. 365) Therefore, the evidence fails to establish that Pinciaro was a supervisor at the time it allegedly sent Haller home to thereby attribute such action to Respondent. Lynn never testified that Respondent disciplined Haller or that Haller was not paid for the time he was allegedly sent home. Pinciaro was unaware if the helper was paid for such time as he does not review employee time sheets. (Tr. 235)

employment was in any way in jeopardy and that he was simply told the work was "unsatisfactory" and to correct it. (Tr. 233-235)

B. Supervisory Status Pursuant to 2(11) of the Act

Respondent amended its Answer to the Complaint at the hearing to assert that Rublee possessed the supervisory indicia to hire, transfer, promote, discharge, assign, discipline, responsibly direct, adjust grievances or effectively recommend such actions.[26] (Tr. 10-11)

Lynn admitted in his June 4 affidavit that "foremen do not have the authority to suspend, layoff, recall, discharge or discipline but they can make such recommendation although I ultimately make the decision whether such will occur."[27] (Tr. 432-433)

Respondent offered minimal testimony regarding Rublee's alleged supervisory authority. Such testimony was limited to assign, effectively recommend discharge, and responsibly direct helpers. Regarding the recommendation to discharge, Lynn testified that Rublee recommended helper Tom Lupton for discharge, and that Lynn, based solely on Rublee's recommendation, laid off Lupton. (Tr. 365) Lynn's conclusory testimony failed to identify what, if anything, Rublee said about Lupton to conclude Rublee wanted him fired. The only generalized statement referenced by Lynn, was that he asked Rublee "how Lupton was progressing as a helper." (Tr. 372) Despite the lack of detail concerning Rublee's alleged discharge recommendation, Lynn

[26] Lynn testified that Foreman John Pinciaro recommended the hire of Chris Johnson and that after his recommendation Lynn interviewed Johnson without Pinciaro and hired him. (Tr. 425-426) Lynn also testified that Project Manager Todd North recommended the hire of Buck Seekings and that afterwards Lynn conducted an informal interview where he met with Seekings and learned about his experience. Lynn testified that after meeting with Seekings, Lynn based his decision to hire Seekings on the fact that "[Seekings] He seemed like a good, solid professional guy. Good attitude from our conversation. And based on the recommendation of Todd, I moved forward."(Tr. 364) It is unclear from the record whether North recommended Seekings in his capacity as a foreman or as a project manager.

[27] Lynn was impeached by his June 4th affidavit on this point but ultimately admitted testify to such statements in his affidavit. (Tr. 432-433)

ultimately decided to layoff Lupton, and he did so after Respondent analyzed reports identifying all the projects on which Lupton worked prior to laying him off. (Tr. 368) These reports provided a labor/cost analysis per project. (Tr. 369) Rublee denied that he recommended Lupton's termination to Lynn. (Tr. 483) Lynn never told Rublee that he terminated or laid off Lupton: Rublee learned of Lupton's lay off from Lupton. (Tr. 483) Rublee testified that Lynn only asked Rublee how Lupton was doing, to which, Rublee responded that he was a little slow but was learning. (Tr. 469)

Lynn testified that in response to Rublee's "recommendation," Lynn reviewed the performance of the projects Lupton worked on. (Tr. 365-366) Lynn further testified that he had a "little bit of interaction with Tom [Lupton]". (Tr. 366) Respondent conducted an extensive analysis of Lupton's time sheets which Lynn testified he reviewed in deciding to layoff Lupton. (Tr. 366, 372, R. Exh. 2) Lynn testified to deciding to layoff Lupton and credits the "majority" of his decision to his discussions with Rublee. (Tr. 366)

Rublee denied having the authority to discipline or discharge a helper or ever doing so. (Tr. 174) Rublee testified about an occasion in which helper Jamie Hall was sick and unable to work. Hall voluntarily decided to go to the jobsite and sleep in the truck until he later decided to go home without asking Rublee's permission. (Tr.198-200, 201) Rublee let Respondent know Hall was not working. (Tr. 201) Rublee assisted Hall by driving him to a location where Hall's girlfriend retrieved him to return home. Rublee testified that he did not know if Hall received pay for the time he was not working and sick. (Tr. 200-201)

Regarding Rublee's alleged authority to responsibly direct helpers, Lynn testified that the helper duties are to organize the materials, and perform the pipe cutting and threading based

on the foreman's measurements. (Tr. 33-34) Rublee testified on cross-examination, in response to a question about determining what tasks to assign a helper, that the helpers duties are "pretty standard" and that they have their own tasks to do on a daily basis as do the foreman." (Tr. 136)

Respondent elicited substantial testimony regarding the duties and functions of a foreman compared to a helper. Respondent's witness, John Pinciaro, testified that he determines what tasks to assign to a helper, from the design drawings. (Tr. 219) When asked about tasks not on the drawings that are assigned to helpers, Pinciaro simply named one of the duties of a helper to organize the site and change orders. (Tr. 219) Under circumstances where there is a change order, the helper continued to prep the pipe, cut the pipe and prepare and assist in hanging the pipe as needed. (Tr. 220) On the occasions that items vary from the drawings resulting in a change order, all testified simply to a different direction of piping or order of installation not a change in function or duties. (Tr. 230-232) When the changes require additional manpower, Pinciaro testified to reporting it to the project managers. (Tr. 229-230) No foremen testified to being disciplined as a result of a helper's work performance.

Notably as a foreman, Respondent presented no evidence of foremen assigning helpers from one worksite to another despite the fact that Respondent operates more than one jobsite. Only Lynn or the project manager directed helpers to move from one worksite to another – not the foremen. (Tr. 427-428) Lynn admitted after being impeached by his June 4 affidavit: "I assign the foreman to a job, and I and the project managers then assign the helpers to the specific job." (Tr. 427-428)

Respondent failed to present evidence demonstrating that foremen are responsible for the performance of the helper. Respondent's witness, Pinciaro testified that when work done by the

helper are being performed incorrectly he will teach the helper how to perform the task correctly. (Tr. 222) Similarly, Seekings testified that when work performed by a helper is not satisfactory, he first explains how the work is to be done, and teach the helper, and if it still is not done correctly he would do it himself. (Tr. 244)

Pinciaro testified to sending a helper home from work. However, Pinciaro described the circumstances of the incident as the helper failing to report to work for an hour and a half. (Tr. 222) Pinciaro called Lynn about the incident. (Tr. 223) Other than this incident, there is no evidence foremen engaged in such a task with any regularity. Pinciaro admitted not performing any hiring. He testified to suggesting a hire which resulted in Lynn interviewing the individual and Lynn deciding to hire him. (Tr.224)

IV. ARGUMENT

The evidence and case law establish that Respondent violated Sections 8(a)(1) and (3) of the Act by making an implied threat of discharge, interrogating its employee, prohibiting employees' discussions about wages and the union, demoting Rublee, from his foreman position and removing his company-owned vehicle, and then discharging Rublee because he engaged in union and protected concerted activities.

A. Rublee Was Never a 2(11) Supervisor

As an initial matter, Respondent failed to establish Rublee was a supervisor under Section 2(11) of the Act. Despite asserting in its amended Answer that Rublee possessed the indicia to hire, transfer, promote, discharge, assign, discipline, responsibly direct, adjust grievances or effectively recommend such action, Respondent only elicited testimony regarding the indicia to

assign, effectively recommend discharge and responsibly direct helpers.[28] (Tr. 10-11) In addition, Lynn admitted in his June 4 affidavit that "foremen do not have the authority to suspend, layoff, recall, discharge or discipline but they can make such recommendation although I ultimately make the decision whether such will occur." (Tr. 432-433)

It is well established that the burden of proof rests with the party asserting supervisory status. Oakwood Healthcare, Inc. 348 NLRB 686, 867 (2006)(citing NLRB v. Kentucky River Community Care, 532 U.S. 706, 713 (2001). To establish that individuals are supervisors, the asserting party must show: (1) that the purported supervisor has the authority to engage in any one of the twelve enumerated supervisory functions; (2) that their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) that their authority is exercised "in the interest of the employer." NLRB v. Kentucky River Community Care, 532 U.S. 706, 710-13 (2001). Purely conclusory evidence does not establish supervisory indicia. Community Education Centers, Inc., 360 NLRB No. 17, slip op. at 11 (2014); Volair Contractors Inc., 341 NLRB 673, 675 (2004). Any lack of evidence in the record is construed against the party asserting supervisory status. Elmhurst Extended Care Facilities, 329 NLRB 535, 536 fn. 8 (199).

1. Assignment of Work

The Board clarified the authority to assign work under Section 2(11) of the Act to mean designating an employee to a place, such as a location, department, or wing; appointing an employee to a time, such as a shift or overtime period; or giving an employee significant overall duties. Oakwood Healthcare, Inc. 348 NLRB at 689. Ad hoc instruction to perform a discrete

[28] To the extend Respondent argues foremen are statutory supervisors based on any other indicia, the record fails to support such a finding, and more importantly, fails to establish Rublee possess such authority.

task is not assignment; further, the assignment of work must be carried out with independent judgment.

Respondent failed to present any evidence that foremen have the authority to assign helpers to a designated place or location. The record evidence shows that Lynn or the project manager assign the field personnel to Respondent's various jobsites. (Tr. 427-428) Lynn testified as follows after being impeached: "I assign the foreman to a job, and I and the project managers then assign the helpers to the specific job." (Tr. 427-428) Lynn was impeached by his affidavit when he attempted to assert that they discuss such matters with the foremen. Lynn's affidavit clearly states that Lynn and the project managers make such assignments. More telling is that Respondent presented no witness testimony that foremen assign helpers to a job. In fact, Rublee testified that he repeatedly asked Lynn to assign a helper to the Aloft job on a bi-weekly basis with little success, resulting in Rublee working alone on the jobsite approximately 70 percent of the time. (Tr. 110-111)

Respondent also failed to establish that foremen assign helpers to significant overall duties. Ad hoc instruction to perform a discrete task is not assignment, which must be issued with independent judgment. Entergy Mississippi Inc., 357 NLRB No. 178, slip op. at 11 (removing field employees from their assigned tasks to work on a trouble case is mere ad hoc instruction.); Greenpark Care Center, 231 NLRB 753 (1977)(where the assignment is temporary in nature, its duration being only the time needed to assist during the emergency or absence, the transfer of employees is insufficient to confer supervisory status).

The evidence establishes that foremen and helper duties are routine in nature. Helper duties are generally to organize the materials, and to assist with installation by cutting and threading the piping based on the foreman's measurements. (Tr. 33-34, 136) The helper's duties

are "pretty standard" – helpers have "their own tasks to do on a daily basis as do the foreman." (Tr. 136) The record is void of any evidence that the foreman give helpers direction outside of the already delegated functions. In deciding which tasks a helper is to perform, the foremen assign tasks based on the blue prints and the national code for sprinkler installation, or, as assigned by Lynn and the project manager. Thus, foremen do not exercise independent judgment.

The foreman themselves merely follow the worksite blue prints and the national code governing the installation of sprinkler systems to determine the tasks of the helpers. Thus, such routine direction lacks independent judgment. (Tr. 219, 220, 230-232)

2. Effectively Recommend

The Board holds that the authority to effectively recommend to means that the recommended action is taken without independent investigation from superiors. Wesco Electrical Co., 232 NLRB 479 (1977). Respondent asserted that Rublee had the authority to effectively recommend the discharge of helper Tom Lupton. However, after Rublee's alleged "recommendation" Lynn testified that he analyzed Lupton's labor/cost per project to ultimately decide to lay off Lupton. (Tr. 366, 372, 369, R. Exh. 2) Lynn's extensive independent review and evaluation of Lupton's labor cost belies any argument that Rublee effectively recommended Lupton's discharge. Respondent utterly failed to sustain its burden to establish that Rublee in fact recommended Lupton's layoff, a fact that Rublee denies. (Tr. 483) Rublee testified that Lynn merely asked Rublee how Lupton was doing, to which Rublee responded that "he was a little slow but was learning." (Tr. 469) In addition, Lynn testified that after reviewing labor/cost reports for the projects Lupton worked Lynn laid him off. (Tr. 369, R. Exh. 2)

Therefore, the record establishes Lynn ultimately decided to layoff Lupton based, in whole or in part, on the information he found in the labor/cost reports and independently investigated.

3. Responsibly Direct

The Board finds a person to be responsible for the direction of others when the person performing the oversight is held accountable for the performance of others. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action and is at risk of adverse consequences for the deficiencies of others. Oakwood Healthcare, Inc. 348 NLRB 686 (2006) Furthermore, simply requesting that certain action be taken is insufficient to establish the authority to responsibly direct. Golden Crest Healthcare Center, 348 NLRB 727, 734 (2006).

Respondent proffered vague testimony about Rublee sending a helper home from work. However, Rublee testified that helper, Hall, decided to return home after sleeping in the truck and deciding not to work.[29] Such voluntary conduct fails to establish that Rublee is a putative supervisor authorized to direct because Hall decided whether such action would be taken. Golden Crest Healthcare Center, 348 NLRB 727, 734 (2006).

It is clear that the foremen, as a more experienced person in the craft, merely provide guidance to the helper as a means of training. Performing on-the-job training is insufficient to establish supervisory status. Chrome Deposit Corp., 323 NLRB 961, 962 (1997); Volair Contractors Inc, 341 NLRB 673, 675 (2004)(a leadman assigning tasks to a crew based on blueprints provided by the employer is routine in nature and failed to establish independent

[29] Respondent presented no evidence that Hall was in fact disciplined as a result of the incident.

judgment.) citing Artcraft Displays, Inc., 262 NLRB 1233, 1234-1235(leadmen who direct crews in accordance with instructions and floor plans furnished by employer do not exercise independent judgment necessary for supervisory status); Electrical Specialties, Inc., 323 NLRB 705, 707 (1997).

Respondent's witness testified to teaching their helper when work is performed incorrectly. (Tr. 222, 244) More importantly the evidence fails to establish that foremen are ever held accountable for the actions of the helper. Oakwood Healthcare, Inc. 348 NLRB 686, 691-92 (2006) In this regard, other than conclusory statements, the record is void of any evidence that foremen were ever disciplined for their work performance let alone the work performance of the helpers. Other than Rublee, Respondent presented no evidence of any other discipline or termination in its workforce.

Therefore, Respondent failed to meet is burden that Rublee possess any supervisory indicia and is thereby a supervisor under Section 2(11) of the Act.

B. Respondent Violated Section 8(a)(1) of the Act by Interrogating Rublee and Making an Implied Threat of Discharge

Section 8(a)(1) of the Act states it is an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of their rights guaranteed by §7 of the Act." 29 U.S.C. 158(a)(1). Section 8(a)(1) is violated if "the employer's conduct tends to be coercive or tends to interfere with the employees' exercise of their rights." Kinney Drugs, Inc. v. NLRB, 74 F.3d 1419, 1427 (2d Cir. 1996)(quoting NLRB v. Okun Brothers Shoe Store, 825 F.2d 102, 105 (6th Cir. 1987)); see, American Freightways Co., 124 NLRB 146, 147 (1959). The standard for determining whether a statement violates Section 8(a)(1) of the Act

"is an objective one that considers whether the statement had a reasonable tendency to coerce the employee or interfere with Section 7 rights, …." Smithfield Packing Co., 344 NLRB 1, 2 (2004); see also, Frontier Hotel & Casino, 323 NLRB 815, 816 (1997); Williamhouse of California, Inc., 317 NLRB 699 (1995).

1. Respondent Failed to Rebut the January 15 Interrogation and Implied Threat of Discharge

In assessing the lawfulness of an interrogation, the Board applies the totality of circumstances test adopted in Rossmore House, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. HERE Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985).

In Bloomfield HealthcareCenter, 352 NLRB 252, 252 (2008), the Board stated:

> The test for whether an unlawful interrogation occurred is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." Rossmore House, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. HERE Local 11 v. NLRB, 760 F.2d 1006 (9th Cir. 1985). The Board considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Id.; Stoody Co., 320 NLRB 18, 18–19 (1995).

The Board has found statements that employees can leave employment in the context of discussing unionization is a threat in violation of Section 8(a)(1) because of the suggestion that unionization is incompatible with their current employment. Gravure Packaging, 321 NLRB 1296 (1996), enfd. Graphic Packaging Corp v. NLRB, 116 F.3d 941 (D.C. Cir. 1997)(employer's statement that employee can "hit the door" and go work for someone unionized); In Belle of Sioux City, LP, 333 NLRB 98 (2001)(employer statement that employee was at-will employee in context of discussion protected concerted activity constituted threat of discharge.); Equipment

Trucking Co., Inc., 336 NLRB 277 (2001)(employer statement to employee that if he did not like it, he could find another job, unlawful).

Rublee's account of the January 15 conversation with Lynn is unrefutted by Respondent. Upon entering the office, Lynn immediately asked Rublee "Are you looking for other work?" Despite Rublee's response that he was not, Lynn stated "if you're looking for other work, there's the door, I can let you go right now. . . what's all this stuff about the Union, I keep hearing this stuff." (Tr. 112-113)

In support of finding Respondent unlawfully interrogated Rublee, Lynn repeatedly testified that he believed the Union was personally out to "hurt him" and to steal away his "good guys". (Tr. 37, 38, 100). The statements were made by the highest ranking official during a one-on-one conversation in his office. Rublee denied seeking other work although he had contacted the Union to return to working for union contractors. In the same statement that Lynn asked Rublee if he was looking for other work – and stating "there's the door, I can let you go now", Lynn interrogated Rublee about the Union by asking him "what's all this stuff about the Union, I keep hearing this stuff." Respondent's statement is an interrogation and implied threat of discharge because it sends a clear message that seeking other employment with the Union is incompatible with continued employment with Respondent. Gravure Packaging, supra; See e.g., Grass Valley Grocery Outlet, 338 NLRB 877 fn. 1 (2003)(unlawful interrogation found where employer states "I hear that you're voting for the union ... I heard from the boys, the boys that used to work there [that you are] a strong leader in the union.") Further evidence of the coercive impact of Lynn's statements was that Rublee denied seeking employment with the Union. Lynn asserts virtually the same reason for discharging Rublee to NYS Unemployment, as the statements made to Rublee on January 15 that Rublee "discussed many times w/other

employees leaving to competitors." (GC Exh. 9) Competitors, Lynn admits are union contractors. (Tr. 71)

C. Respondent Violated Section 8(a)(1) and (3) of the Act by Removing Rublee's Privileges, and then Demoting and Discharging Him

In order to establish unlawful discrimination under Section 8(a)(1) and (3) of the Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. Director, Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 278 (1994), clarifying NLRB v. Transportation Management, 462 U.S. 393, 395, 403 n.7 (1983); Wright Line, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[30]

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee includes: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., Austal USA, LLC, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union

[30] The Wright Line standard upheld in Transportation Management and clarified in Greenwich Colleries proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because Wright Line allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., Wells Fargo Armored Services Corp., 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (see, e.g., Traction Wholesale Center Co., Inc. v. NLRB, 216 F.3d 92, 99 (2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (see, e.g., Mid-Mountain Foods, 332 NLRB 251, n.2, passim, enfd. mem. 169 LRRM 2188 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., Lucky Cab Company, 360 NLRB No. 43 (Feb. 20, 2014) ; Manor Care Health Services – Easton, 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); Greco & Haines, Inc., 306 NLRB 634, 634 (1992); Wright Line, 251 NLRB at 1088, n.12 (citing Shattuck Denn Mining Co. v. NLRB, 362 F.2d 466, 470 (9 th Cir. 1966); Cincinnati Truck Center, 315 NLRB 554, 556-557 (1994), enfd. subnom. NLRB v. Transmart, Inc., 117 F.3d 1421 (6 th Cir. 1997)) .

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See NLRB v. Transportation Management, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. Id.

D. General Counsel Established it Initial Burden that Respondent Unlawfully Demoted Rublee and Removed his Truck Privileges

It is undisputed that Rublee engaged in union activity by talking to employee Hall about returning to the Union. (Tr. 111) In addition, Lynn had knowledge of this protected activity and harbored animus toward that activity. Lynn admitted knowing Rublee talked to Hall about the union by the time Lynn removed Rublee's company-owned vehicle and assigned Rublee to work with Trehune. (Tr. 48) Lynn admitted telling Rublee that Hall told him (Lynn) he was talking about the union. (Tr. 49) Lynn's statements to Rublee on January 15, which constitute both an interrogation and threat, establish Respondent's hostility toward Rublee's union activities. Rublee's unrefutted testimony that Lynn interrogated Rublee and made an implied threat of discharge, occurred immediately before Lynn told Rublee, "I'm pulling your truck, we'll see if you leave now." (Tr. 113) Rublee credibly testified that Lynn assigned him to work with Trehune as his helper. (Tr. 115, Tr.127-128)) During the same conversation, Respondent expressed its hostility toward Rublee's union activities by asking Rublee about all this "union stuff" and making an implied threat of discharge by telling Rublee that Respondent can let him

go "right now." (Tr.113) Rublee testified that Lynn assigned him to the Maple Road home project to work as Trehune's helper where he continued to work until the end of his employment.

Respondent admits removing Rublee's truck privileges although it denies demoting Rublee from his foreman position. However, Section 8(a)(3) of the Act protects against actions that adversely affect terms and conditions of employment despite an employer's assertion that such action is not disciplinary. See Whirlpool Corp., 337 NLRB 726, 738-9 (2002)(the employee's terms and conditions of employment were impacted where the employer's disciplinary process memorialized counseling sessions to be reviewed and used to determine the impact on subsequent policy violations, distinguishing Lancaster Fairfield Community Hospital, 311 NLRB 401 (1993)(conference reports not discipline because no impact on terms and conditions of employment); See e.g. Diversified Enterprises, Inc., 353 NLRB 1174 (2009)(adverse action of removing the use of a company owned truck and gas card indicative of employee demotion); Corliss Resources, Inc., 202 NLRB No. 21 slip op at 3 (February 27, 2015).

The facts of what happened after Lynn interrogated Rublee establish that Rublee suffered a demotion. Respondent repeatedly admitted demoting Rublee from his foreman position in two position statements to the Region during the investigation. (GC Exh. 7, 8) In addition, Lynn admitted removing Rublee's vehicle privileges at the time he assigned Rublee to work with foreman Tailour Trehune at the Maple Road Home on January 15. Rublee was directed to ride with Trehune to the job and was no longer assigned the tools and gas card from his company-owned vehicle.

The benefits of being a foreman were synonymous with truck privileges including the box with various tools assigned to the foreman. The truck privileges saved Rublee the expense

of transportation from home to work and the jobsite and allowed him the flexibility of moving between worksites as was often demanded of Rublee as a foreman. Furthermore, Rublee worked as a helper to foremen Trehune, who was Rublee's former helper that Rublee trained. The coercive impact of requiring Rublee to perform laborer work as a helper for an employee he trained in the craft was observed by employees Trehune and Hall. It is unrefutted by Hall or Trehune that Rublee talked about wages and the Union. Hall and Trehune likely deduced from the circumstances that Respondent's actions toward Ruble resulted from his protected activities.

Therefore, Respondent's removal of Rublee's truck and his assignment to work as a helper to Trehune adversely effected his terms and conditions of employment, and had a coercive impact on employees in violation of the Act.

E. Respondent Terminated Rublee in Violation of Section 8(a)(1) and (3)

It is unlawful for an employer to prohibit employees from discussing their salaries/wages – which is inherently concerted activity. Automatic Screw Products Co., 306 NLRB 1072, 1073 (1992); Triana Industries, 245 NLRB 1258 (1979); Scientific-Altanta, Inc., 278 NLRB 622, 624-625 (1986).

Much of the evidence in support of the General Counsel's initial burden that Respondent terminated Rublee unlawfully is either admitted by Respondent or unrefutted. Rublee engaged in protected concerted activity by discussing his wages with employees. Lynn admits knowing of that activity when he talked to Trehune on February 7 and Trehune reported that Rublee told him he was earning $19.00 per hour. (Tr. 55-56, GC Exh. 7 at 4, par 9) Lynn admits that he called Rublee and discharged him after talking with Trehune about Rublee's discussion of wages with other employees. Lynn further admitted expressing hostility toward Rublee's wage discussions

by stating "why do conversations about wages have to come up? That shouldn't be happening." (Tr. 57) At that time, Lynn discharged Rublee.

It is clear that Lynn discharged Rublee in part because he engaged in union activities. Although Lynn denied talking to employee Jamie Hall on February 7, he admitted that Hall reported to him that Rublee was engaging in union activity. Importantly, Lynn did not refute Rublee's testimony that during the February 7th telephone call when Lynn discharged Rublee, Lynn stated that Rublee had been talking to Hall about the Union. (Tr.119)

F. Respondent Failed to Meet Its Wright Line Burden by its Actions in Piling on Reasons for the Discharge and Offering Shifting Reasons for Rublee's Termination

The Board has described Respondent's rebuttal burden as "substantial." See, e.g., Ballys Park Place, Inc. v. NLRB, 646 F.3d 929 (D.D.C. 2011) ("Where, as here, the General Counsel makes a strong showing of discriminatory motivation, the employer's rebuttal burden is substantial.") (citing Eddyleon Chocolate Co., 301 N.L.R.B. 887, 890 (1991); Van Vlerah Mech., Inc., 320 N.L.R.B. 739, 746 (1996)). "[I]t is not sufficient to demonstrate that an almost infinite variety of possible nondiscriminatory reasons existed and were available, in retrospect, to the Respondent. It must be shown and demonstrated with preponderant evidence that Respondent at the time actually was aware of those reasons and at the time actually acted because of those business reasons and would have acted the same way even in the absence of a partial unlawful motivation." Pace Indus., Inc., 320 NLRB No. 15 (1996).

Such burden is not met "simply" by an employer presenting a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have been taken place even in the absence of the protected conduct. Roure Bertrand Dupont, Inc., 271

NLRB 443 (1984). However, if an employer fails to offer sufficient evidence or, such evidence is unpersuasive to the trier of fact, a violation of Section 8(a)(3) should be found. The Board has found unpersuasive an employer's defense where the testimony is vague and unsupported by personnel and business records. Adair Standish Corp., 290 NLRB 317 (1988).

An employer's proffered reasons for discharging a union supporter appear pretextual where the employer "had no history" of terminating other employee for the same conduct. ADB Utility Contractors, 353 NLRB 166, 182 (2008) affirmed in ADB Utility Contractors, 355 NLRB 1020 (2010) (fact that employer had not disciplined other crew leaders for the same offense is evidence of pretext); Monroe Manufacturing 323 NLRB 24, 26-27 (1997) (employer violated Sec. 8(a)(1) when it disciplined an employee who engaged in protected activity based on a rule that was not strictly enforced against other employees).

Respondent failed to establish that it would have discharged Rublee irrespective of his protected activities. In this regard, Respondent presented no credible evidence that it terminated any other employee, let alone that it discharged an employee for the same or similar reasons it proffered for Rublee's discharge.

The Board noted that an employer fails to meet its burden where it presents "only vague testimony" that employees had been treated similarly to the discriminatee unsubstantiated by personnel records, and where the employer has been "unpredictable" in handling enforcement of such rules in the past. Adair Standish Corp., 290 NLRB 317, 318 (1988)(evidence of discipline for attendance problems unsupported by testimony and personnel records.)

Respondent failed to present credible evidence that it disciplined even one employee, let alone an employee terminated for performance related issues despite, evidence that foreman Buck Seekings repeatedly performed faulty work. (Tr.128-131). LB&B Assocs., 346 NLRB No.

92 (2006)(respondent must provide a rationale, demonstrate a past practice of terminating employees for the same conduct, and show that it has not disparately treated employees for engaging in the same conduct.)

Respondent's unlawful motivation is demonstrated by the shifting and pretextual reasons it provides for discharging Rublee.. Approved Electric Corp., 356 NLRB No.45, slip op at 3 (December 3, 2010)(shifting rationales constitute evidence that the employer's proffered reasons for taking action against an employee are pretextual, citing City Stationery, Inc., 340 NLRB 523, 524 (2003)). In addition, Respondent's independent violations of Section 8(a)(1) alleged herein further establish Respondent's anti-union animus. Dynasteel Corp., 346 NLRB 86, 88 -89 (2005).

"To establish this affirmative defense, '[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity.'" Greenbrier VMC, LLC, 360 NLRB No. 127 (2014). If the employer's proffered reasons are pretextual—for example, false or not actually relied on--the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. Greenbrier VMC, LLC, 360 NLRB No. 127 (2014) (suspicious timing and pretextual rationales preclude finding that Respondent would have fired employee absent protected activity).

When Lynn discharged Rublee by telephone on February 7, he stated his unlawful reasons for the discharge - Rublee's activities of talking about wages and the union. During this proceeding, he attempts to mask his unlawful motive by piling on additional reasons for the discharge, at least two of which is also unlawful. These reasons include: (1) continual loss of

tools and materials and discussing many times w/other employees the idea of leaving to competitors. (GC Exh. 9) This justification includes Rublee's protected activity of discussing moving to Respondent's union competitors. It is evident that Respondent's reliance on that reason is unlawful; (2) Rublee's repeated and continued poor work performance and demeaning action against co-workers and Respondent. The only demeaning action identified is Rublee's wage discussion – stating that he is working for peanuts. Again it is unlawful for Respondent to rely on Rublee's protected conduct as a reason for the discharge; (3) disorganized worksite; (4) a missing gauge for a fire pump; (5) all projects that Rublee worked on from 2013 until his termination because they went over the projected hours for the project. (R. Exh. 5) However, Lynn admitted such possible was a result of the bid hours projected for the project; and (6) theft of time for discrepancies in hours. None of the asserted reasons were born out at the hearing. Rather, the shifting reasons, only serve to further demonstrate Respondent's unlawful conduct toward Rublee. Monroe Mtg., Inc., 323 NLRB 24 (1997); Greenbrier VMC, LLC, 360 NLRB No. 127 (2014); Approved Electric Corp., 356 NLRB No.45, slip op at 3 (December 3, 2010).

V. CONCLUSION

Based on the substantial record evidence, much is admitted and unrefutted by Respondent, and settled Board case law, Respondent independently violated Section 8(a)(1) of the Act by interrogating and making an implied threat of discharge on January 15, and violated Section 8(a)(1) and (3) of the Act by removing Rublee from a foreman position, revoking his truck privileges and all benefits accompanying such privileges, and ultimately terminating his employment. Respondent engaged in such conduct at a time it admitted knowing of Rublee's protected concerted and union activities, and expressly stating and demonstrating its hostility

toward such activities. Therefore, General Counsel respectfully request that a merit finding be awarded on all allegations.

VI. PROPOSED REMEDY

Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. Deena Artware, Inc., 112 NLRB 371, 374 (1955); Crossett Lumber Co., 8 NLRB 440, 498 (1938). These expenses might include: increased transportation costs in seeking or commuting to interim employment[31]; the cost of tools or uniforms required by an interim employer[32]; room and board when seeking employment and/or working away from home[33]; contractually required union dues and/or initiation fees, if not previously required while working for respondent[34]; and/or the cost of moving if required to assume interim employment.[35] Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. See W. Texas Utilities Co., 109 NLRB 936, 939 n.3 (1954) ("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."). See also North Slope Mechanical, 286 NLRB 633, 641 n. 40 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in

[31] D.L. Baker, Inc., 351 NLRB 515, 537 (2007).
[32] Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees, 348 NLRB 47, 50(2006); Rice Lake Creamery Co., 151 NLRB 1113, 1114 (1965).
[33] Aircraft & Helicopter Leasing, 227 NLRB 644, 650 (1976).
[34] Rainbow Coaches, 280 NLRB 166, 190 (1986).
[35] Coronet Foods, Inc., 322 NLRB 837 (1997).

securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work[36], but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." Jackson Hosp. Corp., 356 NLRB No. 8 slip op at 3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). See also Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj, 361 NLRB No. 57 slip op at 2 (Sept. 30, 2014) quoting Phelps Dodge. The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the In Re Midwestern Pers. Servs., Inc., 346 NLRB 624, 625 (2006) ("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment."). discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

[36] In Re Midwestern Pers.Ses., Inc., 346 NLRB 624, 625 (2006)("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.")

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. See Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, available at 1992 WL 189089 (July 14, 1992); Hobby v. Georgia Power Co., 2001 WL 168898 at *29 (Feb. 2001), aff'd Georgia Power Co. v. U.S. Dep 't of Labor, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." Don Chavas, LLC, 361 NLRB No. 10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.[37] These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. See Jackson Hosp. Corp., 356 NLRB No. 8 at *1 (Oct. 22, 2010) (interest is to be compounded daily in backpay cases).

VII. PROPOSED ORDER

Respondent, Armor Construction, LLC, its officers, agents, successors, and assigns, shall,

1. Cease and desist from:

[37] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. Knickerbocker Plastic Co., Inc., 104 NLRB 514, 516 at 2 (1953).

(a) Asking our employees about their discussions with other employees regarding Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, or any other labor organization.

(b) Removing our employee's truck privileges because they engage in activities on behalf of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, or any other labor organization.

(c) Demoting our employees because they engage in activities on behalf of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, or any other labor organization.

(d) Telling our employees that they are prohibited from discussing their wage rate with other employees.

(e) Terminating our employees because they discuss their wage rate with other employees.

(f) Terminating our employees because they engage in activities on behalf of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, or any other labor organization.

(g) In any like or related manner interfering with, restraining or coercing Respondent's employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Respondent will take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Michael Rublee**,** immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges previously enjoyed including the use of a company-owned vehicle.

(b) Pay Michael Rublee for the wages and other benefits he lost because we fired him.

(c) Remove from our files all references to the demotion and discharge of Michael Rublee.

(d) Notify Michael Rublee, in writing, that we will remove from our files all references to his demotion and discharge and that the same will not be used against him in any way.

VIII. PROPOSED NOTICE TO EMPLOYEES

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT ask our employees about their discussions with other employees regarding Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, or any other labor organization.

WE WILL NOT remove our employees' truck privileges because they engage in activities on behalf of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, or any other labor organization.

WE WILL NOT demote our employees because they engage in activities on behalf of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, or any other labor organization.

WE WILL NOT tell our employees that they are prohibited from discussing their wage rate with other employees.

WE WILL NOT terminate our employees because they discuss their wage rate with other employees.

WE WILL NOT terminate our employees because they engage in activities on behalf of Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Michael Rublee**,** immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges previously enjoyed including the use of a company-owned vehicle.

WE WILL pay Michael Rublee for the wages and other benefits he lost because we fired him.

WE WILL remove from our files all references to the demotion and discharge of Michael Rublee and **WE WILL** notify Michael Rublee in writing that this has been done and that the demotion and discharge will not be used against him in any way.

DATED at Buffalo, New York this
12th day of November, 2015

Respectfully submitted,
/s/ Nicole Roberts

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